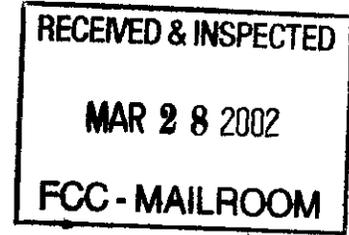


Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
)
Implementation of Video Description of)
Video Programming)
)
)

MM Docket No. 99-339

ORDER

Adopted: March 22, 2002

Released: March 26, 2002

By the Commission:

INTRODUCTION

1. Before the Commission is the Request for Stay filed by the Motion Picture Association of America, the National Association of Broadcasters, and the National Cable and Telecommunications Association (collectively, "Petitioners"), as well as the Opposition to Stay Request filed by the National Television Video Access Coalition ("NTVAC"). Petitioners ask the Commission to stay the effective date of its "video description" rules, until the U.S. Court of Appeals for the D.C. Circuit resolves their pending Petition for Review of the rules. As discussed below, we agree with NTVAC that Petitioners have failed to show that they are entitled to such extraordinary relief, and deny their request.

BACKGROUND

2. Video description is a service designed to enhance the accessibility of video programming to persons with visual disabilities. "Video description" refers to the description of key visual elements in programming, inserted into natural pauses in the dialogue of the soundtrack of the programming. These descriptions can be provided either as part of the main soundtrack of a program, or as a separate soundtrack that members of an audience can turn on to hear the descriptions, or off to hear the main soundtrack without the descriptions. When provided in this latter way for television, the separate soundtrack is provided on the Second Audio Program, or SAP, channel.

3. The Commission adopted its video description rules in July 2000,¹ and made minor modifications to them on reconsideration in January 2001.² The rules require the largest broadcast television stations and multichannel video programming distributors (MVPDs) to provide a limited amount of video description. Specifically, the rules require only the broadcast television stations affiliated with one of the four largest networks (ABC, CBS, Fox, and NBC) and licensed to a community in one of the twenty-five largest television markets (as defined by the Designated Market Areas of Nielsen Media Research) to provide fifty hours of video description per calendar quarter.³ Likewise, the rules require only MVPDs with more than 50,000 subscribers to provide fifty hours of video description per calendar quarter on each of five highest-rated nonbroadcast networks they carry that reach at least

¹ Report & Order, 15 FCC Rcd 15230 (2000).

² Memorandum Opinion & Order on Reconsideration, 16 FCC Rcd 1251 (2001) (Order on Reconsideration).

³ 47 C.F.R. § 79.3(b)(1).

50% of MVPD households.⁴ In order to give affected broadcast stations and MVPDs some time to acquire programming with video description, and if necessary modify their infrastructure to support the distribution of two simultaneous soundtracks (one with video description, one without), the Commission delayed the effective date of the rules for more than a year and a half, until the second calendar quarter of 2002. While the Commission limited the affected broadcast stations and MVPDs to those that are the largest and thus as a general matter have the greatest resources and are the least likely to be unduly burdened by the costs associated with video description, the rules also established procedures for affected parties to seek relief from the rules if compliance would cause an "undue burden."⁵

4. On March 28, 2001, Petitioners filed their Petition for Review ("Petition") of the video description rules with the D.C. Circuit.⁶ Petitioners allege that the Commission's rules are inconsistent with the Communications Act and other laws. On February 22, 2002, more than eighteen months after the Commission released its *Report & Order*, and only one month before the effective date of the rules, Petitioners filed their Request for Stay ("Request") with the Commission.⁷ On March 1, 2002, the National Television Video Access Coalition (NTVAC) filed its Opposition to Stay Request ("Opposition"). On the same date, the American Council of the Blind filed hundreds of letters from citizens indicating that they were opposed to the stay.⁸

DISCUSSION

5. In order to resolve a request for stay, the Commission uses the traditional test, set forth in *Virginia Petroleum Jobbers Association v. FPC*,⁹ as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*¹⁰ A party must show that it is likely to succeed on the merits of its claim; it will suffer irreparable harm if a stay is not granted; no other party will suffer harm if the stay is granted; and the stay will otherwise serve the public interest. As to the first factor, Petitioners contend that they are likely to succeed on the merits because section 713 of the Communications Act does not authorize the Commission to promulgate video description rules; other provisions of the Communications Act do not so authorize the Commission; and the rules are inconsistent with the First Amendment.¹¹ As NTVAC points out,¹² Petitioners have twice before advanced these arguments in this proceeding, and the

⁴ 47 C.F.R. § 79.3(b)(3).

⁵ *Id.* § 79.3(d).

⁶ *MCAA v. FCC*, No. 01-1149 (Mar. 28, 2001). On April 2, 2001, the National Federation of the Blind (NFB) also filed a Petition for Review. *NFB v. FCC*, No. 01-1155 (Apr. 2, 2001). The briefing and hearing schedules for these cases have been consolidated.

⁷ NFB did not join the request. Petitioners' Request states that "[t]he Commission should stay the April 1, 2002, effective date for its video description rules, 47 C.F.R. §§ 79.3 *et seq.* . . ." At the time the Commission adopted the requirements set forth in section 79.3 of its rules, it also adopted certain requirements to enhance the accessibility of emergency information, set forth in section 79.2 of its rules. These latter rules became effective when the Office of Management and Budget approved them on February 1, 2001. See Public Notice, "Amended Emergency Information Rule Effective as of February 1, 2001," DA 01-799 (Mar. 30, 2001). The stay request does not relate to or otherwise affect these rules.

⁸ These letters were filed as attachments to a letter dated March 1, 2002 from Charles H. Crawford, Executive Director, American Council of the Blind, to Robert Corn-Revere, Hogan & Hartson (counsel for Petitioners). Six other parties filed separate letters in opposition to the stay, and two filed separate letters in support of the stay.

⁹ 259 F.2d 921, 925 (D.C. Cir. 1958).

¹⁰ 559 F.2d 841, 843 (D.C. Cir. 1977).

¹¹ Petition at 3-13.

¹² Opposition at 7.

Commission has twice rejected them, both in the *Report & Order* and the *Order on Reconsideration*.¹³ Petitioners offer no new legal arguments or other basis that would cause us to revisit our earlier determination on these issues.

6. Even if Petitioners had demonstrated a likelihood of success on the merits, the test for a stay requires a balancing of all factors, and only when they are “heavily tilted in the movant’s favor” is the extraordinary relief of a stay appropriate.¹⁴ Petitioners’ have not shown that the scales tip in their favor.

7. Petitioners have not shown that they will be irreparably harmed absent a stay. They contend that compliance with the rules will require them to incur costs, possibly in the millions of dollars for all affected parties combined, associated with creating and distributing video description, and will require them to replace other uses of the SAP channel with video description.¹⁵ Aside from the fact that Petitioners do not offer any specific support for the magnitude of their harm,¹⁶ NTVAC suggests that many of the affected parties have already made the necessary expenditures, such that “[g]ranting a stay at this point would not give Petitioners the relief they posit.”¹⁷ As to the costs of creating described programming, the affidavits of representatives from the Narrative Television Network and WGBH – two entities that create described programming – indicate that at least five of the nine affected networks have engaged their services, and that they already have described hundreds of hours of programming for the networks.¹⁸ In addition, some networks, due to their affiliation with other entities that already provide video description, would appear to have an inventory of described programming readily available.¹⁹ As to the costs of distributing described programming, we agree with NTVAC that Petitioners’ argument about alternate uses of the SAP channel proves too much: to the extent Petitioners’ members already are capable of providing a second and simultaneous soundtrack in Spanish,²⁰ they are already capable of

¹³ See *Report & Order*, 15 FCC Rcd at 15251-56; *Order on Reconsideration*, 16 FCC Rcd at 1270-72.

¹⁴ *Ruiz v. Estelle*, 666 F.2d 854, 857 (5th Cir. 1982).

¹⁵ Request at 16-19. Petitioners also claim that they will be irreparably injured without a stay because compliance with the rules burdens speech. This appears to be a reference to their argument that the rules violate their First Amendment rights. As indicated above, the Commission discussed and rejected this argument in the *Report & Order* and the *Order on Reconsideration*.

¹⁶ For example, in support, Petitioners refer to the pleadings they filed in the rulemaking. See, e.g., Petition at 18. In the *Report & Order*, the Commission discounted these claims because they were not supported and inconsistent with the figures provided by entities that actually provide video description. See *Report & Order*, 15 FCC Rcd at 15236 n.34, 15239-40.

¹⁷ Opposition at 2.

¹⁸ Decl. of Larry Goldberg (attached to Opposition); Decl. of James Stovall (attached to Opposition).

¹⁹ For example, Turner Broadcast System, Inc. operates two of the affected nonbroadcast networks – TBS Superstation and Turner Network Television (TNT) – as well as Turner Classic Movies (TCM). See *Turner Broadcasting Sys.*, (visited Mar. 8, 2002) <www.aoltimewarner.com/about/companies/tunerbroad.html> (indicating common ownership of networks and high rank of TBS and TNT). As noted in the *Report & Order*, WGBH had described, as of the date of the comments it filed in the rulemaking, more than eighty films for TCM. *Report & Order*, 15 FCC Rcd at 15231.

²⁰ Petitioners contend that “some Spanish-language programming, and other programming that uses alternate audio, could be supplanted by programs bearing government-mandated descriptions.” Request at 19. Like much of the rest of their request, there is a complete absence of factual support for these claims that are speculative on their face. The Commission has addressed the issue of alternate uses of the SAP channel for foreign language and other services, and found no basis to believe that the minimal requirements for video description will cause any harm to these services. See *Report & Order*, 15 FCC Rcd at 15245; *Order on Reconsideration*, 16 FCC Rcd at 1266. Nothing in the stay request causes us to change that view.

providing a second and simultaneous soundtrack with video description.²¹ Conversely, to the extent Petitioners' members are not equipped to support a second and simultaneous soundtrack, the alternate uses of the SAP channel indicate that any infrastructure upgrades do not automatically translate into a wasted investment if the court strikes down the video description rules, because that equipment could be used for other services that could generate an economic return. In any event, even if Petitioners' claims about the amount of their costs were adequately supported, we can reasonably assume, as NTVAC suggests, that those expenses are minimal compared to the resources of the affected parties – the largest broadcast television stations, MVPDs, and networks in the United States.²² Under these circumstances, Petitioners have fallen short of showing that their injury is “both clear and great,” or that the purported economic would “threaten[] the very existence of the movant’s business.”²³

8. Petitioners also have failed to demonstrate that no party will be harmed if the Commission stays the rules. They argue that not all persons with visual disabilities endorse the rules, and that even those who do “will not, prior to April 1, 2002, have received, or come to rely upon, video described programming not currently being provided.”²⁴ NTVAC responds, however, that persons with visual disabilities will be harmed by further delay because of the importance of television as a medium and the significance of video description in making it more accessible.²⁵ NTVAC also states that entities that have “geared up to meet the demand for described programming,” such as those that have made investments to expand their operations to describe more programming, would also be harmed by further delay.²⁶ Moreover, the Commission has received hundreds of letters from citizens opposed to the stay. Under these circumstances, we do not agree that a stay would not harm any other party.

9. Finally, Petitioners have not shown that a stay will serve the public interest. To attempt to satisfy this factor, Petitioners simply restate that they are likely to succeed on the merits of their claim, and that compliance with the rules will impose “significant burdens” on their members.²⁷ In response, NTVAC balances the benefits for persons with visual disabilities against the costs to Petitioners' members in moving forward with the rules, and suggests that the “direct, dramatic, and immediate, though largely unquantifiable” benefits outweigh “trivial burdens imposed on the entertainment industry.”²⁸ Under the circumstances, we believe that Petitioners have failed to demonstrate that a stay would serve the public interest, and certainly have not done so in a sufficiently compelling way to justify the extraordinary relief of a stay.

²¹ Opposition at 3-4.

²² Opposition at 3.

²³ *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1984). If compliance with the rules in fact constitutes an “undue burden” for any affected party, that party is free to seek an exemption from the rules in accordance with the procedures the Commission established when it adopted the rules. See 47 C.F.R. § 79.3(d).

²⁴ Request at 20.

²⁵ Opposition at 4-5.

²⁶ *Id.* at 5.

²⁷ Request at 21.

²⁸ Opposition at 6-7.

CONCLUSION

10. For the foregoing reasons, we deny Petitioners' Request for Stay.

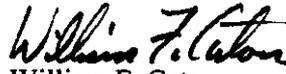
ADMINISTRATIVE MATTERS

11. Alternative formats (computer diskette, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer Information Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov. This Order can also be downloaded in Text and ASCII formats at: <http://www.fcc.gov/cib/dro>.

ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), the Petitioners' Request for Stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary